No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of the United States Department of Agriculture. The respondents are Wileman Bros. & Elliott, Inc.; Kash, Inc.; Gerawan Farming, Inc.; Asakawa Farms, Inc.; Chiamori Farms, Inc.; Phillips, Inc.; Kobashi Farms, Inc.; Tange Bros., Inc.; Nagao Farms; Wilmer Huebert Farms; Kobashi Farms; Nakayama Farms, Inc.; and Mihara Farms.

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The Solicitor General, on behalf of the Secretary of Agriculture, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 58 F.3d 1367. The opinion of the district court (App. D) is unreported. The opinions of the Judicial Officer of the Department of Agriculture

are reported at 49 Agric. Dec. 705 and 50 Agric. Dec. 1165.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1995. A petition for rehearing was initially denied on September 18, 1995. App. 2a.[2] On December 15, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 16, 1996. On January 11, 1996, Justice O'Connor further extended the time within which to file a petition to and including January 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The Judicial Officer (JO) issued two decisions, one dismissing each of the administrative petitions that respondents, among others, filed in the agency proceedings that led to the present case. Because of the length of the JO's decisions and the fact that they are reported, we have reproduced in the appendix to this petition (App. G) only the JO's decision that addresses the question presented in this certiorari petition, and have omitted from that decision the concluding portions that have no bearing on the First Amendment question. We have lodged copies of both JO decisions with the Clerk of this Court.

[2] The Ninth Circuit issued two subsequent orders, on October 3 and 17, 1995 (Apps. B, C), that may have been intended to vacate the September 18, 1995, order denying rehearing and to make the denial of rehearing finally effective as of October 17, 1995. Because the orders are unclear, however, we have treated the date of the first order denying rehearing—September 18, 1995—as the one that triggered the 90-day period for filing a petition for a writ of certiorari prescribed in 28 U.S.C. 2101(c) and this Court's Rule 13.1, and on that basis we requested extensions of the time within which to file a petition for a writ of certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are 7 U.S.C. 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b)(2) and (c). They are reproduced at App. H.

The relevant regulations implementing the Act are 7 C.F.R. 916.20, 916.31, 916.40, 916.41, 916.45, 916.62, 917.16, 917.20, 917.30, 917.34-917.37, and 917.39. They are reproduced at App. I.

STATEMENT

This case presents a First Amendment challenge to provisions in the marketing orders for California peaches, nectarines, and plums issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* The challenged provisions impose mandatory assessments on the handlers (*i.e.*, packers and distributors) of California peaches, nectarines, and plums; those assessments are used in part to finance the generic advertising of those commodities. See 7 C.F.R. 916.45 and 917.39. The district court held that the generic advertising programs do not violate the First Amendment, relying on the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), which upheld against a First Amendment challenge the generic beef promotion program that is established by federal law and financed by mandatory assessments. The Ninth Circuit reversed, holding that the generic advertising programs for California peaches, nectar-

ines, and plums are invalid under the three-part test for reviewing restrictions on commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980).

1. a. Congress enacted the AMAA based on the following finding (7 U.S.C. 601):

> [T]he disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure[,] and * * * these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

The goal of the Act is to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). The Act specifies several means by which the Secretary is to bring about such conditions. Those means include, among other things, establishing "minimum standards of quality and maturity" and "production research, marketing research, and development projects." 7 U.S.C. 602(3). This case concerns the latter means: marketing promotion projects in the form of generic advertising programs.

To carry out his duties under the Act, the Secretary is authorized to issue marketing orders for certain commodities, including peaches, nectarines, and plums. 7 U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). A marketing order may also provide for "production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). The Act specifies that such projects may include—with respect to certain commodities, including California-grown peaches, nectarines, and plums—"paid advertising." *Ibid.*[3] The Act further provides that "the expense of such projects [is] to be paid from funds collected pursuant to the marketing order." *Ibid.*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay annual assessments equal to their pro rata share of expenses of administering marketing orders).

Before issuing a marketing order for a commodity, the Secretary conducts a formal rulemaking proceeding and must in general obtain approval of the order by either two-thirds of the producers (growers) of the commodity, or the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and (9)(B); see *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Once in place, a marketing order is administered under the Secretary's supervision by a committee that is composed of producers (and sometimes handlers) of

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[3] The provision authorizing marketing orders to provide for marketing research and development projects was added to the AMAA in 1954. Agricultural Act of 1954, Pub. L. No. 83-690, § 401(c), 68 Stat. 906. The provision specifying that those projects may include "paid advertising" with respect to certain commodities was first added to the AMAA by the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 403, 76 Stat. 632 (authorizing paid advertising of cherries); see also Act of Nov. 8, 1965, Pub. L. No. 89-330, § 1(b), 79 Stat. 1270 (extending "paid advertising" provision to, *inter alia*, California plums and nectarines); Act of Aug. 13, 1971, Pub. L. No. 92-120, § 1, 85 Stat. 340 (extending "paid advertising" provision to California peaches).

the regulated commodity. 7 U.S.C. 608c(7)(C), 610. The members of the committee are appointed by the Secretary, serve without compensation, and are subject to removal by the Secretary at any time. 7 C.F.R. 916.23, 916.62, 917.25, 917.30. Among other duties, the committee recommends a yearly budget for administering the marketing order, which includes a budget for advertising and other types of promotion; the Secretary may accept or reject that recommendation. 7 U.S.C. 608c(7)(C); 7 C.F.R. 916.31(c), 916.62, 917.35(f); see App. 10a-11a (describing budget-approval process in this case). After the Secretary adopts a budget, he promulgates a regulation prescribing assessments on handlers to fund the budget. See 7 U.S.C. 610(c); 7 C.F.R. 916.41, 917.37; see also, *e.g.*, 60 Fed. Reg. 52,067, 52,068 (1995).

A marketing order may be discontinued in two ways. The Secretary must terminate or suspend an order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). In addition, the Secretary must terminate an order when he determines that a majority of the producers does not support it. 7 U.S.C. 608c(16)(B).

b. This case concerns two marketing orders issued under the AMAA: the marketing order for California-grown peaches and plums and the marketing order for California-grown nectarines.[4]

[4] The AMAA requires marketing orders to be restricted "to the smallest regional production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B). For that reason, there may be different orders for the same commodity grown in different States. Compare, *e.g.*, 7 C.F.R. Pt. 948 (marketing order for Irish potatoes grown in Colorado) with 7 C.F.R. Pt. 950 (marketing order for Irish potatoes grown in Maine) and 7 C.F.R. Pt. 953 (marketing order for Irish potatoes grown in southeastern States).

The marketing order for California peaches and plums was first issued in 1939. See App. 43a. It was amended to authorize marketing promotion projects in 1965. 30 Fed. Reg. 15,995 (1965). It was further amended to specify that such projects could include "paid advertising" for plums in 1971 and for peaches in 1976. See 36 Fed. Reg. 14,381 (1971); 41 Fed. Reg. 14,375, 17,528 (1976). The plum portion of the marketing order ended in 1991, after a majority of plum producers failed to vote for its continuation in a periodic referendum. App. 5a n.1, 43a; 56 Fed. Reg. 23,773 (1991).[5]

The marketing order for California nectarines went into effect in 1958. It has authorized marketing promotion projects since its inception (see 7 C.F.R. 937.45 (1959)) and has specifically authorized "paid advertising" since 1966 (see 31 Fed. Reg. 8177 (1966)).

A portion of the assessments imposed under the two orders has been used to pay for generic advertising programs in each of the years at issue here. See App. 8a n.3.

2. The present case arose from two administrative petitions filed by handlers of California peaches, nec-

[5] Respondents seek a refund of the assessments that they paid under the plum marketing order and that were used for the generic advertising program for plums. The validity of that program is therefore not moot. The marketing order for California-grown peaches and plums has also covered California-grown pears. The pear portion of the order has never been at issue in this case, however, and was suspended in 1992. Accordingly, we do not refer to that portion of the order hereafter.

tarines, and plums challenging the marketing orders for those fruits. After the Secretary dismissed the petitions, respondents brought an action seeking judicial review of the dismissal. The United States then brought 15 enforcement actions against the individual respondents, seeking, *inter alia*, to collect assessments that respondents had refused to pay. Most of the government's enforcement actions were consolidated with the action brought by respondents.

a. The two administrative petitions were filed by respondents and other handlers pursuant to 7 U.S.C. 608c(15)(B), which permits handlers to request the Secretary to modify, or exempt them from, marketing orders that are "not in accordance with law." The petitions challenged various provisions of the marketing orders for California peaches, nectarines, and plums in effect from 1980 through 1988. App. 6a, 41a. The challenges were far-ranging but primarily concerned (1) the substance of the maturity standards; (2) the procedures followed in adopting those standards and other provisions in the marketing orders; and (3) the generic advertising programs provided for by the orders. *Ibid.*[6] As additional handlers joined those challenges, they, too, temporarily ceased paying their assessments. *Ibid.*

Reversing decisions by an administrative law judge in favor of the handlers, see App. 6a, the Judicial

[6] Before the Secretary had disposed of the administrative petitions, respondent Wileman Bros. & Elliott, Inc., brought an action in federal district court challenging the maturity standards in the marketing orders. The district court dismissed that action because of Wileman Bros.' failure to exhaust administrative remedies, and the Ninth Circuit affirmed. *Wileman Bros. & Elliott, Inc.* v. *Yeutter*, No. 87-2938 (Oct. 29, 1990); see also App. 6a-7a.

Officer (JO) of the Department of Agriculture dismissed both administrative petitions. App. 113a-274a.[7] In the ruling relevant here, the JO rejected the handlers' First Amendment challenge to the Secretary's approval of budgets that included expenditures for generic advertising programs. He determined, *inter alia*, that, assuming that the use of mandatory assessments for generic advertising implicates the handlers' First Amendment rights, it is nonetheless a permissible use under "cases involving 'union-shop' arrangements," as well as under *United States* v. *Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), in which the Third Circuit upheld against First Amendment attack a generic beef promotion program created by federal law and funded by mandatory industry assessments. App. 194a-207a. The JO's decision was the final decision of the Secretary. 7 C.F.R. 2.35.

b. Wileman Bros. and 15 other handlers filed this action in the United States District Court for the Eastern District of California under 7 U.S.C. 608c(15)(B), which confers on the district courts jurisdiction in equity to review the Secretary's decision on administrative petitions filed under Section 608c(15)(A). The United States brought 15 enforcement actions against handlers under 7 U.S.C. 608a(6) to recover unpaid assessments and to require compliance with the maturity standards in the challenged marketing orders. App. 7a; see generally

[7] As noted above (note 1, *supra*), the JO issued separate decisions on the two petitions. Because only the later-filed petition challenged the generic advertising programs on First Amendment grounds, that challenge is addressed exclusively in the JO's decision dismissing that petition.

United States v. *Ruzicka*, 329 U.S. 287, 289 (1946). The district court consolidated 13 of the enforcement actions with respondents' action, dismissed two of the enforcement actions without prejudice, and ordered the handlers to pay assessments into the registry of the Court. App. 6a n.2, 7a. Later, the district court entered summary judgment in favor of the Secretary and entered a money judgment against the handlers for approximately $3.1 million. App. 7a.

The district court upheld the generic advertising programs against the handlers' First Amendment challenge, applying the three-part inquiry undertaken by the Third Circuit in *Frame*. In accordance with that inquiry, the district court first determined that the mandatory funding of generic advertising serves a "compelling" governmental interest. App. 89a. The court relied in part on the legislative history of the AMAA, which showed that the Act responded to serious instability in agricultural markets. *Ibid.* Next, the court determined that the generic advertising programs for California peaches, nectarines, and plums serve an "ideologically neutral" purpose, namely, to "bolster the image of California tree fruit in an effort to increase sales." App. 89a-90a. Finally, the court found that "[t]he assessment programs' interference with first amendment rights is slight." App. 90a. It explained that the programs merely promote products that respondents have voluntarily chosen to market, and that their complaints about those programs reflected only disagreement over the advertising strategy underlying them. App. 90a-91a. The district court also rejected respondents' other challenges, including their claim that the generic advertising programs were arbitrary and capricious, and should therefore

be set aside under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*[8]

3. The court of appeals affirmed in all respects but one: It reversed the district court's ruling on the First Amendment challenge, holding that the generic advertising programs—as authorized by regulations imposing mandatory assessments to fund budgets that included those programs—violate the First

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[8] In other rulings that are not the subject of this petition, the district court identified those claims by respondents over which it had jurisdiction, determined the type of relief that was available for those claims, and held, with respect to those claims, as follows: The minimum-size requirements for nectarines were supported by substantial evidence. App. 58a-62a. The Secretary had good cause for allowing those requirements to take effect in less than 30 days (App. 63a-67a), and he committed, at most, harmless error by adopting them after a comment period of less than 30 days (App. 67a-71a). The assessments imposed under the marketing orders, including the assessments for generic advertising, were not procedurally invalid under the APA. App. 71a-84a. The Secretary did not violate the equal protection guarantee of the Fifth Amendment by requiring the handlers of peaches and nectarines produced in California, but not the handlers of peaches and nectarines produced in other States, to pay assessments for generic advertising. App. 92a-93a. The AMAA did not unconstitutionally delegate legislative authority to the Secretary. App. 94a. The proceedings of the tree fruit committees did not violate the Government in the Sunshine Act, 5 U.S.C. 552b, the Federal Advisory Committee Act, 5 U.S.C. App. 1 *et seq.*, or state law. App. 95a-96a. The handlers failed to demonstrate any illegal conduct by the "California Tree Fruit Agreement" (the term used to identify the committees and staff that administer the two marketing orders at issue) cognizable in the present case. App. 96a-98a. Finally, the handlers were not deprived of procedural due process because of any delay by the Secretary in ruling on their administrative petitions. App. 98a-100a.

Amendment under the three-part test set forth in *Central Hudson* for reviewing restrictions on commercial speech. App. 1a-35a.

Before addressing the First Amendment issue, the court of appeals affirmed the district court's holding that the generic advertising programs are not arbitrary or capricious under the APA. App. 9a-12a. The court of appeals determined that "[t]he formal rulemaking records accompanying the Secretary's original decisions to implement the paid advertising programs for nectarines, plums, and peaches are replete with evidence that supports his decision." App. 9a. The court also determined that there was ample evidence to support the continued need for the programs. It observed that much of that evidence was supplied by the "industry-led committees and their staff," which "engage in a careful process each year * * * in approving the advertising program for the upcoming season." App. 11a. The court rejected the handlers' argument that the Secretary relied too heavily on the committees, observing that the committees are made up of "parties with firsthand knowledge of the state of their industry." App. 12a (citing *Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1488 (9th Cir.), cert. denied, 113 S. Ct. 598 (1992)).

The court of appeals nonetheless sustained respondents' First Amendment challenge to the generic advertising programs. App. 15a-21a. The court held that the assessments for generic advertising "implicate the handlers' First Amendment rights because they are compelled to provide financial support for particular messages—the generic ads—associated with a particular group—peach and nectarine handlers." App. 15a. The court then determined that its First Amendment analysis was "largely governed by"

(*ibid.*) its decision in *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429 (1993), which had struck down on First Amendment grounds the generic advertising program established by the almond marketing order then in effect under the AMAA.

As it did in *Cal-Almond*, the court of appeals in this case applied the three-part test of *Central Hudson*. It first determined that the government had a "substantial" interest in promoting peaches, nectarines, and plums, and therefore satisfied the first part of the test. App. 16a-17a. The court determined, however, that the government had not satisfied the second part of the test by showing that the programs "directly advanced" the government's interest. App. 17a-20a. Relying on *Cal-Almond*, the court stated that, to make that showing, the government was required to "demonstrat[e] that the generic advertising program is better at increasing consumption than individualized advertising"; in the court's view, the government failed to make that showing. App. 20a. The court also determined that the government failed to satisfy the third part of the *Central Hudson* test, because it had not shown that the generic advertising programs were "sufficiently narrowly tailored." App. 20a-21a. The court believed that the programs would be more narrowly tailored if they granted individual handlers a credit against their individual assessments for any amounts they spent on their own advertising. *Ibid.*

Addressing the question of remedy, the court of appeals held that respondents were not entitled to money damages but were entitled to a refund of assessments used for generic advertising. App. 32a-34a. The court determined that money damages were

barred by sovereign immunity, but equitable relief in the form of a refund was not. App. 32a-33a. The court remanded the case to the district court for a determination of the amount of the refund due. App. 34a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred by relying on *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), to strike down under the First Amendment the generic advertising programs for California peaches, nectarines, and plums conducted pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* *Central Hudson* provides a framework for reviewing *restrictions* on commercial speech. The generic advertising programs challenged in this case are not of that character. To the extent that the programs implicate the First Amendment at all, they do so, not by restricting the commercial speech of handlers, but by compelling handlers to fund commercial speech. The most analogous cases are those involving compelled funding of unions and integrated bars, such as *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). The generic advertising programs comport with the First Amendment under the principles of *Abood* and *Keller*, especially since this case involves the funding of purely commercial speech promoting the purchase of products that respondents have voluntarily chosen to sell. In any event, the generic advertising programs also comport with the First Amendment under the *Central Hudson* test invoked by the Ninth Circuit.

The Ninth Circuit's decision is at odds with the Third Circuit's decision in *United States* v. *Frame*,

885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), which rejected a First Amendment challenge to the generic beef promotion program established by federal law. In upholding the program, the Third Circuit applied what it described as a "higher standard of scrutiny" than was applied in *Central Hudson*. *Frame*, 885 F.2d at 1134. It thus is clear from *Frame* that the Third Circuit would uphold the generic advertising programs that the Ninth Circuit struck down in this case.

The Ninth Circuit's decision warrants review by this Court. In invalidating the generic advertising provisions of the marketing orders, the court of appeals has essentially held unconstitutional the corresponding provisions of the AMAA that expressly authorize such "paid advertising" programs funded by assessments on handlers. See 7 U.S.C. 608c(6)(I). A holding of unconstitutionality is itself sufficient to call for review by this Court. In addition, however, this case presents an important issue of First Amendment law as to which the lower courts have reached conflicting results; and the decision below creates uncertainty in the administration of numerous federal and state statutes and threatens to have a major impact on the Nation's farm economy. There are numerous federal and state statutes creating generic promotion programs funded by mandatory industry assessments, covering a wide variety of commodities. A significant portion of the agricultural commodities covered by those programs is produced in the Ninth Circuit.

1. a. The Ninth Circuit erred in reviewing the generic advertising programs for California peaches, nectarines, and plums under the *Central Hudson* test. *Central Hudson* provides a framework for

reviewing restrictions on commercial speech. See, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995). That framework is inapplicable here, because the marketing orders do not restrict speech, commercial or otherwise. Indeed, they could not do so consistently with the AMAA, which provides: "No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product." 7 U.S.C. 608c(10). Respondents thus remain free to advertise their own products and to criticize the generic advertising programs.[9]

Respondents' challenge is founded, not upon any restriction on their right to engage in commercial speech, but upon the requirement that they fund commercial speech conducted under the generic advertising programs. The most analogous cases are

[9] Respondents contended in the court of appeals that the generic advertising programs restricted their ability to engage in commercial speech in two ways. First, they argued that, by requiring them to fund generic advertising, the programs reduced the amount of money they had available to buy advertising promoting their own brands. Resp. C.A. Br. 11. That argument proves too much. The same argument could be made regardless of whether assessments under the marketing order are used for generic advertising or for some other purpose wholly unrelated to expression. In either event, the assessments constitute a regulatory expense that reduces the amount of money that the handlers have available for advertising (as well as for any other purpose besides paying the assessment). The imposition of such expenses does not, as a general matter, raise any First Amendment issues. Respondents also argued below that generic advertising promotes the "lie" that all peaches and all nectarines are the same, defeating their efforts to advertise their products as superior. *Id.* at 12. The district court found it "impossible" from those "vague claims" to determine that respondents' First Amendment rights have been significantly infringed. App. 90a, 91a.

those involving compelled funding of union activities by non-union members of the bargaining unit, such as *Abood* v. *Detroit Bd. of Educ.*, *supra*,[10] and the compelled payment of dues to integrated bars, such as *Keller* v. *State Bar of California*, *supra*.[11] The Court

[10] In *Abood*, this Court reviewed a First Amendment challenge to an "agency shop" agreement for public employees, under which non-union members were required to pay the union a service charge equal to union dues. 431 U.S. at 211-215. The Court held that the agreement did not violate the First Amendment "insofar as the service charges [we]re applied to collective-bargaining, contract administration, and grievance-adjustment purposes," *id.* at 232; however, the service charges could not, consistently with the First Amendment, be used "for political and ideological purposes unrelated to collective bargaining," *ibid.* See also *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292 (1986); *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 448 (1984); cf. *Communications Workers* v. *Beck*, 487 U.S. 735 (1988); *Brotherhood of Railway Clerks* v. *Allen*, 373 U.S. 113 (1963); *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956).

[11] In *Keller*, the Court discerned "a substantial analogy between the relationship of the State Bar [before the Court] and its members, on the one hand, and the relationship of employee unions and their members, on the other." 496 U.S. at 12. The Court in *Keller* accordingly determined that the State Bar was, despite its statutory genesis and resemblance to a government entity in certain respects, "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* at 13. Relying on the *Abood* line of cases, the Court held that the State Bar could, consistently with the First Amendment, use mandatory dues to fund activities "germane" to its statutory mission of "regulating the legal profession and improving the quality of legal services," but could not use mandatory dues to "fund activities of an ideological nature which fall outside of

in *Abood* and *Keller* upheld compelled funding for activities by a representative entity (1) that were germane to the entity's statutory mission; (2) that were justified by an important governmental interest and by the interest in avoiding "free riders"; and (3) that did not "significantly add to the burdening of free speech that is inherent in the allowance of" the compelled funding scheme. See *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Keller*, 496 U.S. at 13-15.

In our view, although *Abood* and *Keller* furnish the most appropriate general principles for reviewing the generic advertising programs at issue here, application of those principles must reflect that those programs involve purely commercial speech—namely, advertising that "propose[s] a commercial transaction," *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989). Congress accordingly should be afforded greater latitude in providing for the compelled funding of commercial speech than may be afforded to the compelled funding of the sorts of activities at issue in *Abood* and *Keller*.

In any event, the generic advertising programs for California peaches, nectarines, and plums comport with the First Amendment under the standard of review set forth in *Abood* and *Keller*. As the district

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those areas of [germane] activity." *Id.* at 13-14. See also *Lathrop* v. *Donohue*, 367 U.S. 820 (1961).

court held in this case, the programs serve the compelling governmental interest in protecting and improving the farm economy. App. 89a (AMAA responded to the "great economic problems" of the Nation's farmers) (quoting H.R. Rep. No. 1927, 83d Cong., 2d Sess. 4 (1954)). The programs are an integral part of a comprehensive scheme for regulating supply and demand for agricultural commodities. Some parts of that scheme—for example, the maturity standards—are addressed to the supply; the generic advertising programs address demand by promoting steady and increasing consumption. Cf. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341-342 (1986) ("reasonable" for legislature to conclude that advertising "would serve to increase the demand for the product advertised"). The generic advertising programs, like other parts of the comprehensive regulatory scheme established by AMAA marketing orders, entail costs that are reasonably borne by members of the industry, who benefit from the "orderly marketing conditions" (7 U.S.C. 602(1)) established by the marketing orders. Moreover, the use of mandatory assessments to fund the administration of the marketing orders, including the provisions authorizing generic advertising programs, avoids the same sort of "free rider" problems that justify agency-shop agreements and integrated bars. Cf. *Abood*, 431 U.S. at 222; *Keller*, 496 U.S. at 12. Finally, as the district determined, the programs do not unduly infringe on respondents' First Amendment rights, since the programs merely promote the products that respondents themselves have voluntarily chosen to market. App. 90a.

b. Assuming *arguendo* that the *Central Hudson* test were applicable here, the generic advertising programs satisfy that test as well. In reaching a contrary conclusion, the Ninth Circuit misapplied *Central Hudson*. The Ninth Circuit erred, when applying the second part of the test, by requiring the government to "demonstrat[e] that the generic advertising program is better at increasing consumption than individualized advertising." App. 20a; see App. 17a-20a. The two kinds of advertising serve different purposes. Generic advertising aims to increase the overall market for the fruit or vegetable grown by producers covered by the order; individualized advertising primarily aims to give the particular advertiser a bigger share of that market.[12] Moreover, the proof required by the court is almost impossible to mount for any generic advertising program because of the speculative nature of the proof.[13] Finally, in requiring such proof, the court ignored that the

[12] For similar reasons, the Ninth Circuit erred, when applying the third part of the *Central Hudson* test, by holding that the generic advertising programs should have allowed handlers a credit against their assessments for advertising their own brands. App. 20a-21a. The advertising of individual brands is not necessarily as effective in promoting overall demand for a product as is the generic advertising of the product.

[13] To make the showing required by the Ninth Circuit, one would arguably have to demonstrate (1) what additional advertising by individual handlers would have occurred in the absence of the generic advertising programs; (2) how effective that hypothetical additional advertising by individual handlers would have been; and (3) how its effectiveness would have compared to the effectiveness of the generic advertising programs (which would have to be estimated without taking into account the effectiveness of any advertising by individual handlers that actually occurred).

generic advertising programs serve "the Act's most fundamental objectives—to wit, the protection of the *producers*," *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 352 (1984) (emphasis added), not merely the interests of handlers. And the court ignored as well that the programs are developed by members of the industry, who, as the Ninth Circuit recognized in rejecting respondents' APA challenge, have "firsthand knowledge" of the need for such programs. App. 12a.

2. The Ninth Circuit's decision in this case also cannot be squared with the Third Circuit's holding in *Frame*. In *Frame*, the Third Circuit rejected a First Amendment challenge to provisions of the Beef Promotion and Research Act of 1985 (Beef Promotion Act), 7 U.S.C. 2901 *et seq*, that impose mandatory assessments on cattle producers and importers to finance a national beef promotion campaign. *Frame*, 885 F.2d at 1122, 1129-1137. Under the analysis of *Frame*, the Third Circuit would uphold the generic advertising programs that the Ninth Circuit struck down here.

Relying on *Abood*, the Third Circuit in *Frame* held that "compelled contributions to the Beef Promotion Program implicate[d] [Frame's] right to be free from compelled association." 885 F.2d at 1133; see *id.* at 1132-1134.[14] The court determined, however, that

[14] In holding that the beef promotion program implicated Frame's First Amendment rights, the Third Circuit rejected the government's argument that speech under that program constituted "government speech," the compelled funding of which does not implicate the First Amendment. *Frame*, 885 F.2d at 1131-1133. The government in the present case did not advance a "government speech" argument in the courts below, and we accordingly do not rely on it in this Court as an inde-

"Frame's assertion of a free association claim triggers a higher standard of scrutiny than employed in cases involving only regulation of commercial speech." *Id.* at 1134. The court derived what it regarded as the proper standard from *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984).[15] The court in *Frame* concluded that, under *Roberts*, the use of mandatory assessments for the generic beef promotion program would comport with the First Amendment if it served "compelling state interests, unrelated to the suppression of ideas, that [could not] be achieved through means significantly less restrictive of associational freedoms." 885 F.2d at 1134.

The Third Circuit held that those requirements were met. It determined that the Beef Promotion Act served the government's compelling interest in protecting the beef industry; moreover, the portion of the Act imposing mandatory assessments for the generic

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pendent ground of decision. We nevertheless believe that the constitutionality of the mandatory-assessment method of funding the commercial speech is reinforced by the degree to which the generic advertising programs further the governmental objective of promoting the sale of products covered by the respective marketing orders, the governmental involvement in the development and adoption of the marketing orders, and the attenuated nature of the connection that an individual handler has to the generic advertising of peaches, nectarines, or plums as a result of the handler's financial contribution to the overall administration of the marketing order.

[15] In *Roberts*, the Court reviewed an administrative order entered under the Minnesota Human Rights Act that required the United States Jaycees to admit women to its local chapters in Minnesota. 468 U.S. at 612-617. The Court held that the order did not violate Jaycee members' rights of intimate or expressive association. *Id.* at 622-629.

promotion program played an integral role in furthering that interest, because of the "free rider" problem associated with attempting to fund such programs on a voluntary basis. *Frame*, 885 F.2d at 1134-1135. The court observed that the "primarily economic" nature of the underlying governmental interest "does not diminish its importance." *Id.* at 1134 (citing *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 455-456 (1984) (interference with First Amendment rights caused by agency-shop agreements "is justified by the governmental interest in industrial peace")). The court also determined that the purpose of the Beef Promotion Act was "ideologically neutral," because it was intended to "bolster the image of beef solely to increase sales." *Frame*, 885 F.2d at 1135. Finally, the court held that the Act did not unduly infringe on the defendant-producer's First Amendment rights. The court observed that the Act authorized a program that was limited to "promot[ing] the product that the defendant himself has chosen to market," and it found that the defendant's "specific objections" to the program did not establish "a dispute over anything more than mere strategy." *Id.* at 1136-1137.

The generic advertising programs at issue here would survive respondents' First Amendment challenge under the analysis in *Frame*, as the district court in this case concluded. See App. 85a-92a. The strength of the governmental interest in promoting the market for peaches, nectarines, and plums is comparable to the governmental interest underlying the beef promotion program at issue in *Frame*. Cf. *Keller*, 496 U.S. at 13 (Court cannot say that the "vital national interests" served by agency-shop agreements at issue in *Abood* were weightier than

the "substantial" governmental interest served by integrated bar). Moreover, the generic advertising programs for peaches, nectarines, and plums, like that for beef, are "ideologically neutral." *Frame*, 885 F.2d at 1135. Finally, as the district court found, respondents' objections to the generic advertising programs reflected merely disagreement over advertising strategy—as did Frame's. App. 90a-91a.[16]

In our view, however, the *Frame* court, while reaching the correct result, erred by applying a "higher standard of scrutiny" than would apply to a restriction on commercial speech. 885 F.2d at 1134. The Third Circuit derived its standard from *Roberts* v. *United States Jaycees*, *supra*. The standard applied in *Roberts*, however, reflected that "a not insubstantial part of the [speech at issue] constitute[d] protected expression on political, economic, cultural, and social affairs." 468 U.S. at 626 (internal quotation marks omitted). This case involves no such expression. Cf. *id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment) (discussing the

[16] By the same token, it seems unlikely that the generic beef promotion program upheld in *Frame* would have been upheld under the Ninth Circuit's analysis here and in *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429 (1993). The Ninth Circuit in *Cal-Almond* struck down a generic advertising program for almonds that, it stated, "closely resemble[d]" the program in *Frame*. 14 F.3d at 435. The government did not petition for a writ of certiorari in *Cal-Almond* because the Ninth Circuit's decision there was based in part on specific features of the regulations establishing the generic advertising program for almonds as to which the Secretary was considering significant amendments at the time of the Ninth Circuit's decision. See *id.* at 439-440; see also 59 Fed. Reg. 4247 (1994).

"dichotomy between rights of commercial association and rights of expressive association").

Whatever their relative merits, it is sufficient for present purposes to note that the decisions in *Frame* and this case take divergent approaches and reach conflicting results on the validity under the First Amendment of government-created generic advertising programs funded by mandatory industry assessments. In light of the importance of the constitutional question, this Court should resolve that confusion. Compare *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 300 (1986) (granting certiorari to address validity of union's procedure for refunding agency-shop fees to dissenting members, in light of "[t]he importance of the case, and the divergent approaches of other courts to the issue").

3. Quite aside from the conflicting approaches and rulings in the lower courts, certiorari is warranted in this case because it "raises questions of importance in the administration of the Agricultural Marketing Agreement Act of 1937," *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946), as well as in the administration of two other sets of statutory programs. Under the AMAA, the Secretary has promulgated a large number of marketing orders that include generic advertising programs funded by mandatory assessments.[17] In addition, there are many other

[17] Marketing orders issued under the AMAA establish generic promotion programs for (among other products), limes, 7 C.F.R. 911.45; avocados, 7 C.F.R. 915.45; winter pears, 7 C.F.R. 927.47; papayas, 7 C.F.R. 928.45; olives, 7 C.F.R. 932.45; onions, 7 C.F.R. 958.47; tomatoes, 7 C.F.R. 965.48; celery, 7 C.F.R. 967.44; filberts/hazelnuts, 7 C.F.R. 982.58; and dates, 7 C.F.R. 987.33. See also 7 U.S.C. 608c(6)(I) (listing

federal statutes that authorize such programs.[18] Many state statutes authorize such programs as well.[19]

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those commodities as ones for which marketing orders may provide for "paid advertising").

[18] National promotion programs funded by industry assessments have been established for (among other commodities) beef, 7 U.S.C. 2901 *et seq.*; cotton, 7 U.S.C. 2101 *et seq.*; eggs, 7 U.S.C. 2701 *et seq.*; pork, 7 U.S.C. 4801 *et seq.*; soybeans, 7 U.S.C. 6301 *et seq.*; honey, 7 U.S.C. 4601 *et seq.*; lamb and wool, 7 U.S.C. 7101 *et seq.*; and cut flowers, 7 U.S.C. 6801 *et seq.*

[19] For statutes in States in the Ninth Circuit, see, *e.g.*, Ariz. Rev. Stat. Ann. §§ 3-404(B)(2) (1995) (marketing orders for agricultural commodities may provide for "programs for advertising and sales promotion"), 3-417 (1995) (authorizing industry assessments to pay for administration of marketing orders); Cal. Food & Agric. Code §§ 58889(a) and (b) (West 1986) (state marketing orders may provide for "advertising and sales promotion" directed toward "increasing the sale of the commodity without reference to any private brand or trade name"), 58921 (West 1986) (authorizing mandatory industry assessments to pay for administration of marketing orders); Idaho Code §§ 22-2915, 22-2918 & 22-2921 (1995) (establishing commission authorized to use mandatory assessments for generic promotion of Idaho beans), 22-3005(10), 22-3006 & 22-3010 (1995) (same for Idaho prunes), 22-3105(7) & 22-3107 (1995) (same for Idaho hops), 22-3309(3)(e), 22-3310 & 22-3315 (1995) (same for Idaho wheat), 22-3510(2)(j) & 22-3515 (1995) (same for Idaho dry peas and lentils), 22-3605(2)(j), 22-3606, 22-3607 & 22-3610 (1995) (same for Idaho apples), 22-3802, 22-3805(8) & 22-3806 (1995) (same for Idaho mint and other essential oils); Mont. Code Ann. §§ 80-11-205(1)(d) & 80-11-224(2) (1993) (same for Montana wheat and barley), 80-11-304(6), 80-11-307 & 80-11-310 (1993) (same for Montana alfalfa seed); Nev. Rev. Stat. Ann. §§ 561.409(2), 587.145(2)(d), 587.151(1)(e) & 587.155 (Michie 1994) (same for Nevada alfalfa seed); Ore. Rev. Stat. Ann. §§ 576.305(13), 576.325 & 576.440 (1988) (authorizing commissions for food products to conduct generic advertising

a. The Ninth Circuit's decision would apparently invalidate the operation in that Circuit of many of the statutorily created generic promotion programs funded by mandatory assessments.

It is clear that the Ninth Circuit's decision could invalidate many of the generic promotion programs established under AMAA marketing orders in addition to the programs for California peaches, nectarines, and plums. The Ninth Circuit did not base its decision in this case on any features peculiar to the programs at issue here. The Ninth Circuit did suggest that the challenged programs would be more narrowly tailored if they gave handlers a credit against their assessments for their individual advertising efforts. App. 20a. That suggestion, however, does not significantly narrow the impact of the decision. For one thing, it is unclear whether the Secretary may allow advertising credits for most commodities covered by AMAA marketing orders.[20]

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funded by mandatory industry assessments), 577.290(12) & 577.511 (1988) (same for Oregon Beef Council), 577.730(14) & 577.785(1) (1988) (same for Oregon Sheep Commission), 579.100(1) and (11), 579.210 & 579.270(3) (1988) (same for Oregon Potato Commission); Wash. Rev. Code Ann. §§ 15.28.170 (West 1993) (establishing Washington State Fruit Commission), 15.44.130 (West 1993) (establishing Washington State Dairy Products Commission), 15.65.310, 15.65.390 & 15.65.420 (West 1993) (marketing orders under state law may provide for advertising and promotion to be paid for by mandatory assessments).

[20] Under 7 U.S.C. 608c(6)(I), the Secretary is specifically authorized (but not required) to allow credits for advertising by individual handlers of almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. The absence of specific authorization for credits under other generic

Moreover, although the inclusion of a creditable advertising provision in a marketing order might cure the purported narrow-tailoring defect identified by the Ninth Circuit, it would not cure the other purported defect identified by the Ninth Circuit—that the government had not shown generic advertising to be more effective than advertising by individual handlers. The latter was related to the "directly advances" (rather than the "narrow tailoring") part of the *Central Hudson* test. App. 20a.

The Ninth Circuit's decision could also invalidate generic advertising programs under other federal and state statutes.[21] The Ninth Circuit in *Cal-Almond* stated that the generic advertising program established by the AMAA marketing order for almonds, which that court struck down, "closely resemble[d]" (14 F.3d at 435) the generic promotion program established by the Beef Promotion Act, indicating that the latter could well be invalidated under the court's analysis. The Beef Promotion Act, in turn, is similar to many other federal statutes that establish generic

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advertising programs may imply the absence of such authorization. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

[21] In the wake of the Ninth Circuit's decision in *Cal-Almond*, a First Amendment challenge to the Beef Promotion Act upheld in *Frame* has been brought in the District of Kansas, *Goetz* v. *Espy*, No. 94-1299 (filed Aug. 2, 1994). In addition, a First Amendment challenge based on the decisions below and in *Cal-Almond* has been asserted in an administrative proceeding before the Department of Agriculture concerning the federal mushroom promotion program. See *In Re Donald B. Mills, Inc., d/b/a DBM Mushrooms*, MPRCIA 95-1; see also note 22, *infra*.

promotion programs for other commodities. See note 18, *supra*. And many of the state statutes establishing such programs resemble either the AMAA or commodity-specific federal promotion statutes such as the Beef Promotion Act. See note 19, *supra*.[22]

b. Considering its likely effect upon each set of programs discussed above, the Ninth Circuit's decision will have a significant impact. The Department of Agriculture has informed us that, in 1994, a total of $23.7 million was spent nationally on research and promotion under AMAA marketing orders; of that total, more than $20 million was spent under orders in effect exclusively within the Ninth Circuit. The Department of Agriculture also reports that, under generic promotion programs created by commodity-specific federal statutes such as the Beef Promotion Act (see note 19, *supra*), approximately $183 million was spent in 1994 nationwide. It is reasonable to assume that a significant portion of that amount was spent in the Ninth Circuit. Finally, all of the States

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[22] In addition to the pending cases involving First Amendment challenges to federal programs (see note 21, *supra*), there are at least seven other pending cases presenting First Amendment challenges to generic promotion programs established under state law. See *Bidart* v. *California Apple Comm'n*, No. CV-F-94-6018-OWW (E.D. Cal.); *Duarte Nursery, Inc.* v. *California Grape Rootstock Improvement Comm'n*, No. CV-F-95-5428-OWW (E.D. Cal.); *Dukesherer Farms, Inc.* v. *Michigan Cherry Committee*, No. 1-95-CV-742 (W.D. Mich. filed Oct. 19, 1995); *John I. Haas, Inc.* v. *Washington State Commodity Bd.*, No. CV-95-3165 AAM (E.D. Wash. filed Nov. 17, 1995); *Matsui Nursery, Inc.* v. *California Cut Flower Comm'n*, No. CV-S-96-102 EJG (E.D. Cal. filed Jan. 17, 1996); *California Kiwifruit Comm'n* v. *Moss*, No. C018368 (3d Dist. Cal. App.); *Wileman Bros. & Elliott, Inc.* v. *Voss*, No. F02317 (5th Dist. Cal. App.).

in the Ninth Circuit except Alaska and Hawaii—*i.e.*, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington—have enacted statutes creating marketing orders or promotion boards under which generic promotion of commodities may be conducted using mandatory assessments. See note 19, *supra*. The Attorney General of California stated in an amicus brief filed below that in 1993 that State alone had 47 marketing programs patterned on federal marketing programs that spent $91 million on generic advertising and education. Attorney General of California C.A. Amicus Br. 1-2 (rehearing stage).

This Court should grant review to resolve the question of the constitutionality of these important statutory programs affecting major segments of the Nation's agricultural economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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